In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT, v. EARL B. COE. } No. 45.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

BRIEF ON BEHALF OF UNITED STATES.

REPLY.

Since writing the brief on behalf of the Government in this case, I have been served with an additional brief by the appellees to which I deem it proper to make some reply. As to the facts disclosed by the record and the controversies relating thereto between myself and counsel upon the other side, I deem it immaterial to reply, as the record will speak for itself. I do not deem it prudent or proper to waste space or time in explaining the performance of my duty when I seek to analyze the grant and every element of it, with a view of determining

whether or not it was lawfully and regularly made by competent authority, as required by the act creating the Court of Private Land Claims, as a condition precedent to a confirmation.

I have challenged the *bona fides* of this grant and continue to do so. Attached to the original *expediente* in the receipt for the taxes, the alleged granting officer, Jose Justo Milla, did not correctly write his own name. It is not contended that the name as signed to that instrument by the granting officer is a bad signature, but that it is absolutely wrong in this, that the name was written "Jose *Jose* Milla" in a splendid hand, and, judging from its execution, the man who wrote it was not under such influences or conditions as might occasion his writing most any name. It has not been shown, and I do not suppose it can be, that the granting officer in this case ever signed his name in this way before. An examination of the archives at Hermosillo shows that he had two ways of signing his name, "Jose *Justo* Milla," and "Milla." The remarkable similarity between this signature attached to the *expediente* and the other signatures of Milla known to be genuine was the cause of a good deal of conflict of testimony as to its genuineness. From an examination made by Mr. Will M. Tipton, expert in the office of the United States attorney for the Court of Private Land Claims, he was unwilling to say that this signature had not been written by Milla, but Mr. Hopkins, who was used by the Government in the litigation in California, pronounced it a forgery.

A large amount of testimony was introduced tending strongly to prove that the signature was genuine, and

also the genuineness of a large number of other signatures that were attached to the document. But this does not meet the challenge that it was antedated. It is a historical fact that in California many grants which were presented for confirmation were manufactured subsequent to 1846, to which the signatures were all genuine. The condition in which we found the signature of Jose Justo Milla required and justified a careful analysis of the title, both as to the matter of execution and as to the matter of record, and also its custody and the acts of ownership sought to be exercised by those claiming under it from time to time. In my statement in the original brief I called attention to the fact that part of the proceedings of survey was not signed by the measurers. Replying thereto counsel for appellee excuses this upon the ground that they could not write their names, and refers to the concluding part of the certificate. This is the only certificate of all that I have had occasion to examine wherein an individual who should have signed a paper did not do so if he could write, or if he could not write, where his name did not appear as having been written by someone for him and that fact stated. An examination of these certificates will show that there were others who could not write their names, but their signatures were placed to the instruments for them by someone else.

STATE GRANTS.

In the last brief filed by counsel for the appellee, we have the contention squarely made that the States of the Mexican Republic did not acquire the title to the public

lands from the National Government, but were from their creation the owners thereof, and I am firmly convinced they must sustain this contention or the claim should be rejected. I shall not go over the ground covered in my original brief, in the historical statement, as to the status of the title to the vacant lands in Mexico. Counsel quotes several pages of historical matter from Mr. John H. Knaebel, a lawyer of ability and learning. A reading of his historical statement, however, demonstrates the fact that its principal value consists in his denunciation of the political integrity of General Iturbide. But at no place in his statement does Mr. Knaebel undertake to show where the title to the vacant public lands was at any time or under any circumstances.

It is historically correct, and the fact appreciated by all who have had occasion to investigate the question, that the title to the vacant public lands in New Spain originally belonged to the King and were disposed of under his orders, promulgated through the council of the Indies. Upon independence a nation was established, resulting in the Empire of Mexico, with General Iturbide as its head and Emperor. That nation was composed of all the provinces that had existed under Spain. The title to the public lands must have vested in that Empire or nation, and I propound the question: At what time, by what constitution, or by what law did it pass from the nation to any State, department, or territory? It is true General Iturbide did not become Emperor through any constitutional means, nor by virtue of any legal enactment. He became Emperor by force and power, and by the same force and power he maintained

himself and received the submission of his subjects as well as recognition from other Governments. And I may say that in the various transitions of Mexico from one form of government to another, none of the changes were accomplished by constitutional or lawful means, but by force of arms and revolution. But such changes, when once recognized and submitted to, were quite as effective as if they had been accomplished by constitutional and lawful means.

It is contended by counsel for appellee that in the constitutive act the sixth article thereof says, in speaking of the integral parts of the new government, that they *are* free, sovereign, and independent States, etc., and that by virtue of such wording of the declaration the conclusion is to be drawn that they had always been free and independent and entitled to the public lands, as were the thirteen colonies of this country. In the constitutive act and in the constitution it appears affirmatively that Mexico was declared to be a then existing nation. The fifth article of the constitutive act says: "The *nation* adopts for the form of its government a popular representative federal republic."

At that time it had overthrown Iturbide; a provisional government was in existence seeking to reach a more liberal form of government than had theretofore existed, but appreciating fully the fact that it had always been a recognized unity. Hence, in liberalizing the government, as suggested by Justice Hemphill in the case of the *Republic* v. *Thorne* (3 Tex., 499), the nation divided itself. The whole proposition may be stated in a few words. The States as created under the constitutive act

of January 31, 1824, and afterwards ratified by the constitution, had no rights and no power except those delegated to them by the National Government, and the National Government retained supreme power except in so far as it had surrendered by its own constitution any of its attributes to the States. In the formation of our Government the nation was created by the Colonies, and the powers and rights of each delegated and surrendered to the National Government, so that Justice Hemphill's statement was accurate.

I do not deem it prudent to enter into a detailed criticism of the brief filed by counsel for the appellee or the sources of his information, but submit a translation from Mr. Orozco's work recently published upon this question, believing that his means of information and evident ability entitle his statements to great professional consideration, and with what information I have been able to gather after a number of years of labor, that for the purposes of this litigation we shall never be able to arrive at any more accurate historical and logical result than is contained in his article on State grants, which is as follows:

PART 1.

[From Legislation and Jurisprudence on Public Lands, by Licentiate Wistano Luis Orozco, Mexico, 1895, Vol. I, p. 309.]

114. It has been seen in Title IV and in the present one how serious a matter is the issue of titles by the States, departments, and territories, which has had and will have for a long time yet an enormous importance.

In reality the adjudications of public lands made by the States, departments, and territories in favor of their inhabitants have been a great many. And what is even

more lamentable, they have also been made with greater frequency than would be believed by the ayuntamientos (common councils) of the towns, which have received the benefit of the price obtained from their adjudications, made without the slightest shadow of legality.

Thus it is that there are many properties unstable, unsettled at least, exposed to being the object of litigation, in which the federation may recover or attempt to recover legitimate rights.

115. This being so, those titles issued by incompetent authorities well deserve a little study and labor in order that we may see whether, in every case, a title of this character not revised by the General Government is void, and whether, at least, prescription will not come to throw a perpetual mantle over the defects that affect that title, thus transforming it into a safe and firm ægis of the right of property it is intended to protect by it.

The States have had power to give property titles in accordance with the law of August 18, 1824, for the express purpose of colonizing the lands ceded.

These titles are perfectly valid.

The States or departments could give titles of property with the express consent of the General Government, although the lands ceded may not have been intended for colonization.

These titles are equally valid, firm, and legitimate.

The States have issued property titles either under their own special laws or without any law having been previously enacted in the matter, without intending the lands granted for the important purpose of colonization, and without the previous consent of the General Government.

These titles are void and of no value as long as the revalidation thereof by the General Government is not obtained.

In this last case are the titles issued by the governments of the Territories and of the Departments in the

epochs when the system of the central Republic existed in the country; but the titles issued by these governments with the express authorization of the General Government are valid, firm, and legitimate.

Titles issued by the common councils are absolutely void. Neither action nor exception can be based upon them, and they can only give a right to the reduction of prices granted in the law of March 26, 1894.

116. * * * It remains for us to investigate whether void titles not revised by the General Government can serve as a *just title* and *just cause* to create the right of prescription with power to acquire.

We believe those titles are not sufficient to create the just cause required as an element essential to acquire an immovable by prescription.

117. Article 3 of the law of December 3, 1855, considers fraudulent and illegal the alienations made by the States, departments, or territories, without the express consent or express authorization of the General Government, and subjects the holders of lands so alienated to the penalties the laws provide for punishing those who acquire property by fraud and against the law. And the same article expressly declares that the titles in which said alienations are set out are void and of no value. Therefore, the holders of these titles and the possessors of the lands ceded by them lack *good faith*, *just cause*, and *just title*, elements essential to acquire an immovable by prescription.

The title is lacking, because a void title can not be alleged nor be made to serve to prove the *just cause* of possession. *Quod nullum est nullum producit effectum.* For, as Pothier says, "In order that a possessor may acquire, by prescription, the thing he possesses, it is indispensable that the title from which the possession proceeds be a legitimate title." If his title is void, *a void title*

can not be considered a title, and the possession that proceeds from the same is a possession without title, which can not produce prescription.

The *just cause* is lacking, because this is nothing else than a proper title to transfer dominion, and a void title does not transfer it.

Finally, *good faith* is lacking, because this is based on an error of fact, which may be excusable in us, as we can never take advantage of error as against law. *Nunquam in usucapionibis juris error possessori prodest. Juris ignorantiam in usucapione negatur prodesse: facti vero ignorantiam prodesse constat.*

118. And although the law of July 22, 1863, grants reductions up to 50 per cent in the price of public lands to the possessor who has a title transferring dominion, *although said title is issued by one who had no right to issue it*, the concession extends only to the reduction of prices, but the Republic does not waive its right of dominion over those public lands, held under titles issued by one who had no right to issue them.

Finally, article 27 of said law requires that "all the requirements the laws prescribe for prescription" concur, in order that thereby property in an immovable may be acquired. And legal requirements are all those we have noted.

Law of April 6, 1830: After the colonization law of August 18, 1824, there is no other law on the subject till April 6, 1830, when the legislative chambers enacted the law of that date. (Reynolds, 148.) The principle that dominion over the public lands in their demarcations belongs to the States appears to be enunciated in articles 3 and 4 of this law. This principle is contrary to the text and spirit of article 11 of the "Acts of constitutional reforms" (Reynolds, 281), which was an integral part of the constitution of 1824, and only shows, in the words of Mr. Orozco, "how nations can err in their infancy."

Law of April 25, 1835: This is a decree of the National Government annulling a law of the State of Coahuila and Texas of March 14, 1835. (Reynolds, 193.)

Article 2 of this decree enunciates the same principle as articles 3 and 4 of the decree of April 6, 1830, just cited.

PART 2.

[Orozco, Vol. I. pp. 182 et seq., after giving the text of the law of August 18, 1824.]

RIGHTS OR POWERS OF THE STATES.

11. We have transcribed this decree in full, both because it is the first we find in the *collections* of laws that embrace under a general point of view the important matter of the colonization of our immense territory and because of the provisions of grave transcendency which it contains relative to the intervention of the States in the matters of which this law is the object.

12. In reality, from its spirit and context, it appears that this law supposes the States admitted, by the constitutive act, as lawful owners of the public lands situated within the limits of their jurisdiction. Article 3, ordering the States to make laws or regulations for the colonization of their respective demarcations; article 10, directing the States to attend to soldiers who may be entitled to the allotment of lands that this allotment be made to them in reward for their virtues, as we suppose, attending to the spirit of that article, are precepts which apparently place beyond doubt the fact that the States of the ancient federation are considered as owners of the public lands in their territory.

13. We believe that several States have acted upon that article in granting property titles to public lands from those situated within their jurisdiction.

We do not believe there is any other law in existence of more importance than this one, upon which the States

may have been able to base their competency to have cognizance in matters relating to public lands, for although Escriche's book (Dictionary of Legislation and Jurisprudence), edition of 1884, in the "Ordinances on land and water of the Republic of Mexico," which he inserts in one of its appendices, says that by the decree of August 4, 1824, there were given to the States the proceeds from the sales and compositions of lands in their respective demarcations, and that there remained for the General Government those from the territories of the federation, "we have carefully examined" the decree of August 4 which Escriche cites, and we find that that assertion is entirely false, for, far from that decree making such a declaration, it expressly says (article first) that the national lands, of whatever denomination they may be considered, are a part of the federal revenues, and there is not found in all that law a single expression from which it could be deduced that the public lands are considered or declared to be the property of the States.

[Translator's note. In a footnote Mr. Orozco cites the following part of article 1 of the law of August 4, 1824:

"ART. 1. The following belong to the general revenues of the federation:

* * * * *

"9. National property, in which is included that of the Inquisition and temporal property of the clergy, and any other rural or urban property that belongs or shall hereafter belong to the public exchequer."]

14. We believe, then, that in the decree of August 18, 1824, which we are considering, is principally where some rational foundation may be found for supposing the States have powers to legislate upon matters of public lands, and to adjudicate them to individuals as property, since, at least, it would be difficult to give any other interpretation to articles 3 and 10, which we have already cited, and to articles 11 and 16 of said decree.

15. Article 11 says that if the Supreme Government should deem it opportune to dispose of any portions of land to any of the employees of the federation, military as well as civil, *it may do so from the public lands in the territories.*

Article 16 directs that the Government proceed to the colonization of the *territories of the Republic* under the rules this decree establishes.

III.

OBSERVATIONS.

16. It appears, then, that the powers of the federation to dispose of the public lands are restricted to the territories of the same, and that the constituent congress wished to leave to the States the dominion of the public lands situated within the limits of their demarcation.

From this have arisen very serious disputes, obscure confusions, as to the legitimacy of the rights acquired by individuals.

17. From the terms in which are conceived the constitutive act and the political constitution of 1824, as well as other decrees of that memorable assembly, it appears to follow that the constituents of 1824, in their inexperience in public affairs and of the great political interest of nations, were inclined, as a general rule, to divide the sovereignty and respectability of the Republic into many and wretched fragments.

18. If we follow this spirit which dominated those legislators, well might we say that the *eminent domain* over the national territory was ceded by this decree to the States into which the nation was divided by the constitutive act and by the constitution of 1824.

19. Nevertheless, as the *summum imperium*, the *eminens dominium* over the territory belongs to the very essence and nature of sovereignty, and as the national sovereignty

resides not in the States but in the federation, the organ of that sovereignty recognized by foreign powers, it can not be supposed that the nation would surrender any part of what constitutes the essence of its sovereignty, except by means of an explicit and express *constitutional* law.

20. Now, then, neither in the constitutive act nor in the political constitution of 1824 is there found the slightest indication that the constituents had the intention of despoiling the nation of the sovereignty of the territory for the purpose of granting it, after being torn into strips, to weak States, which could never duly represent the majesty of the Republic before the other powers of the world.

21. That the decree of August 18 was enacted by the constituent congress is not all; when it passed other laws than the constitution, it acted as an ordinary legislative assembly, and the case may very well have occurred of an unconstitutional law enacted by said congress, which had the high mission of giving a fundamental law to the Republic.

22. Then, at least, we can not consider legitimate any legislative act the purpose of which was to despoil the nation of its sovereignty over its own territory.

IV.

LEGITIMATE SIGNIFICATION OF THE RIGHTS OF THE STATES.

23. Thus it is that the only conclusion which, upon final analysis, can be reached from the provisions of the decree of August 18, 1824, is that the States could make laws upon colonization and grant property titles to public lands in the name of the Government of the Union, and that in all this they acted as simple agents of the federation.

24. This doctrine is confirmed by the diverse decrees enacted at later dates, at times by the congresses, at others by the executives of the nation, which decrees we will consider in their place, and from which the invariable fact is observed that congresses and executives consider it within their exclusive jurisdiction to legislate on the matter of public lands. (See laws of July 7, 1854; November 25, 1853; December 3, 1855, and circular of October 4, 1856, herewith, in part 3.)

25. These doubts as to the competency of the States to legislate on said matter disappear at the time of the publication of the regulations of December 4, 1846, which fixed general rules for carrying out the survey and colonization of the public lands of the Republic, which regulations do not intrust to the States the power or the duty to survey or adjudicate as property the public lands within their jurisdiction.

26. Finally, article 11 of the "Act of reforms," promulgated May 21, 1847, declares that it is of the exclusive power of the general Congress to give bases for colonization of the lands of the Republic, and under this constitutional precept the States are deprived of the right to make laws on colonization, although there is no express repeal of the law of August 18, 1824, so long as said power is not again granted to them—power which has not again been granted to them up to date.

V.

TITLES ISSUED BY THE STATES.

27. But it is a fact that the States and even the departments, during the epoch of the central government, issued property titles for public lands.

All these titles were subject to revision not only under the decree of July 7, 1854, and November 25, 1853, which were declared void by the constituent congress on

the 16th of October, 1856, but also under the law of December 3, 1855, still in force up to date in so far as not in conflict with later laws and under the circular of October 4, 1856.

28. All this may give rise to important questions as to the validity of the titles issued by the States or the departments and as to whether or not those titles can be sufficient to establish the right of prescription in the cases where they have not been revised by the Federal power.

But we will consider these questions in title 6 of this book, when we speak of the laws we have just cited.

[Orozco, Vol. II, pp. 784 et seq.]

I.

ON DIVERSE MODERN ORIGINAL TITLES.

354. We call modern titles *those documents transferring the dominion of land issued by the rulers of Mexico since national independence.*

These titles, as we have already stated, have been issued by the Presidents of the Republic, and probably also by the Emperors of Mexico, or in their name, the channel for the said issue of titles being the department of exterior and interior affairs, the department of the interior, and, finally, the department of public works.

But many titles of dominion were also issued by the governors of the States of Coahuila and Texas, Chihuahua, Sonora, and Sinaloa, which promulgated on matters of colonization and occupation of public lands the special laws which we consider in title 4 of the present book. Other States, without making laws on the occupation of public lands, have also granted many titles of dominion over them, believing themselves fully authorized to do so by the general law of August 18, 1824. The political

chief of Lower California and of the extinguished Territory of Tehuantepec also issued titles for the ownership of public lands located in the region under their command. Sometimes, also, the common councils of the towns issued property titles for lands situated in their demarcation, which titles are evidently void.

355. With respect to titles issued by the governors of the States or departments and by the political chiefs of the Territories, the supreme powers of the Republic have issued several important laws, now declaring the nullity of those titles, now establishing certain formalities by which the revalidation and perfectionment of said titles may be obtained, which laws we have collected and studied in Titles IV and VI of the present book, to which places we refer our readers, if they desire more information on the matter.

Some of the titles issued by the governors of the States were given with the express purpose of colonizing the lands disposed of, or were given by these same governors, or by those of the departments in the epochs of the Central Republic, or by the political chiefs of the Territories with the express authorization of the supreme government of the nation. These titles are declared valid, sufficient, and perfect by the law of December 3, 1855. All titles that were issued by said governors or political chiefs without the conditions mentioned need to be revalidated and confirmed by the supreme government of the nation, under penalty of being considered fraudulent, null, and of no value, as provided in article 3 of said law of December 3, 1855.

356. We have, then, starting from national independence:

1. Titles of dominion over public lands issued by the common councils of the towns.

2. Titles issued by the political chiefs of the Territories.

3. Titles issued by the governors of the departments or of the States of the Republic.

4. Titles issued by the Presidents or by the Emperors of Mexico.

Titles issued by the common councils of towns or by the governors of the States are in the form of a writ of sale drawn up under the old routine of notaries public, for the formalities and formulas of an adjudication of royal lands were things unknown to our *provincial* people.

Titles issued by the Presidents of the Republic are in the ceremonious form of an *imperial favor*.

II.

ON THE VALIDITY OF MODERN TITLES.

357. In regard to the validity of modern titles, as we have stated in titles 4 and 6 of the present book, we have:

1. The titles issued by the common councils of the towns are void and of no value.

2. The titles issued by the governors of the departments or by the political chiefs of the Territories, without the express consent or authorization of the supreme government of the nation, are void and of no value, so long as they are not revalidated by said supreme government.

3. Titles issued by the governors of the States without lawful authority therefor or without dedicating them to the exclusive purpose of colonization are void and of no value, so long as they are not revalidated by the supreme government of the nation.

4. Titles issued by the executives of the frontier States or Territories, in favor of naturalized foreigners or natives of adjoining countries, for lands situated within the extreme twenty leagues of our territory, are void and of no value for all time.

5. The titles issued by the governors of the States in accordance with the precepts of the law of August 18,

1824, and for the exclusive purpose of colonizing the lands granted, are perfect, valid, and reliable.

6. The titles issued by the governors of the States and by the political chiefs of the Territories with the express authorization or consent of the supreme government of the nation are valid and perfect.

7. The titles issued by said authorities without the consent or authorization of the supreme national government, but afterwards revised and authenticated and confirmed by said supreme government, are valid, sufficient, and perfect.

8. The titles issued by the supreme rulers of Mexico are valid, perfect, and sufficient for all time.

358. The validity of which we here speak is that of the title considered by itself, and not with regard to its object, because all questions that may arise from the conflict of rights with third parties will at times make an original title ineffective, but they will not affect its own nature. The only thing that will happen in these cases *is that there will be no matter upon which to execute the title*; that is to say, there will be lacking in that title the possibility of its exercise, but not the legal validity.

SANTA ANNA'S DECREES.

I do not desire to add much to what has been said in the original brief with reference to the decrees of Santa Anna of November 25, 1853, and July 7, 1854, except that succeeding governments of Mexico up to the present day, although these decrees were declared to have been improperly promulgated, have recognized the correctness of the statement of the status of the titles and original rights of the States and departments. Counsel for appellee insists that the law of November 25, 1853, is an attempted forfeiture of titles lawfully vested in citizens of Mexico.

It is not pretended by the decree, nor is it claimed by anyone who has ever examined it, that it purports to forfeit lawfully vested rights; but it is a construction, by the proper authority of Mexico, of its own laws and the rights of the various political departments in relation to those of the National Government, resulting in the legal proposition that persons holding title under the States and departments during the various systems, which titles had not received the assent or approval of the National Government, never had from the inception any lawful right, and therefore there could necessarily be no forfeiture. But it seems to me that even had the superior authorities of Mexico under its own laws forfeited the title, it illy becomes us, having recognized that same Government, having treated with it and purchased the property from it, to undertake to protect its own citizens when it did not then and does not now recognize that they had any rights to be protected. The difficulty into which counsel has been led is the fact that the action was that of Santa Anna, dictator, and he bears heavily upon his title and he relieves against it by denouncing him as a political usurper and dictator exercising superior authority over Mexico without any right. Be this as it may, as a historical proposition the United States is in no condition to make such a contention.

It will also be understood that I do not admit that the effect of Santa Anna's decrees was to work a forfeiture of any vested rights, but they were simply declaratory of what was the the existing law of the Republic as construed by proper authority.

And the application of the provisions of the act creating the Court of Private Land Claims, also the treaty and the laws of the Mexican Republic as construed at the time of the treaty by proper authority, regard parties holding under State grants as being detainers without title.

It is true that they were permitted by subsequent decrees made by Santa Anna and those who succeeded him in providing the means by which these detainers could obtain lawful titles, and giving them a preference right to do so, but such laws and decrees were matters of grace and not matters of right.

If the claimants in this case assumed that the proceedings they have initiated in the Court of Private Land Claims would result, if the contentions of the Government were sustained, in a forfeiture of the title which they possessed, they should not have availed themselves of the provisions of the act, but stood upon the election given them by Congress in the eighth section thereof.

But when Congress permitted the United States to be sued, it had the right to prescribe the terms and conditions upon which said suit could be maintained, and in availing themselves of the provisions thereof, they accepted the burdens imposed.

It seems to me that in construing the treaty and rights guaranteed thereunder, which were only such as were obligatory upon the Mexican Government at the time, we must read into the treaty the law under which the grant was made and the construction given thereto by a proper authority at the time the treaty was signed.

Without discussing the matter further, and in order to show the court the construction given to these various decrees then and now by the officials of the Republic of Mexico, I respectfully refer to the following translation from Mr. Orozco's work:

PART 3.

Mr. Orozco, at page 277, Vol. I, of his work, speaking of the Santa Ana decrees, says:

95. Both the law of November 25, 1853 [Reynolds, 324], and that of July 7, 1854 [Reynolds, 326], were declared null by the decree of the constituent congress promulgated October 16, 1856 [Reynolds, 331]. But, as ordinarily happened in the midst of our lamentable political dissensions, the faction triumphant at the time put in force the very statutes it nullified, accomplishing nothing more than a change of phrases and suppressing the salutary and appropriate rules which the law of July 7, 1854, established for the revision of titles, thus resulting therefrom all the inconveniences and annoyances of revision without the advantages of a positive, legal, and recognized procedure for accomplishing said revision.

96. This revision was then provided for by the law of December 3, 1855, and its construction determined by the circular of 1856 [hereinafter], which we have cited. Therefore it is not without utility to know in full the decrees nullified, the legal predecessors of those which are in force, and the precepts of which are executed in practice in making revisions, inasmuch as there are no others on the subject.

Orozco, page 288:

104. The following law has not been nullified up to date [1895]: Law of December 3, 1855 (Reynolds, 329).

105. Article 2 of this law declares valid all alienations made by the States, departments, or Territories, provided

those alienations have been made *with the express authorization or consent of the supreme government;* a declaration which makes no innovation, for the same thing had been declared in articles 5, 6, and 7, of the law of July 7, 1854, and in article 2 of the law of November 25, 1853.

106. Article 3 declares void all titles issued by the States, departments, or Territories without the express consent and approval of the General Government; the same thing that had been declared by the provisions of the laws of 1853 and 1854, which we have just cited.

We find, then, proclaimed and sanctioned in this decree, once more, the principle that every title issued by a State, department, or Territory is void, if it was not made in the name of the General Government, and so long as the revalidation of that Government is not obtained to purify it of every legal defect.

107. Both in this decree (article 5) and in that of July 7, 1854 (article 7), are declared null the alienations made in favor of private persons (individuals or companies) for the express purpose of colonizing the lands granted if the grantees have not complied with the conditions of colonizing them.

It is seen at once that those lands are denounceable by any person whatever qualified to acquire public lands; although it is the obligation of the denouncer to prove, before competent tribunals, the failure to comply with that condition [that of colonizing]; for it is not just to suppose that the grantee has violated a solemn compact.

[Circular of October 4, 1856.]

108. The genuine construction of the decree we have inserted in the foregoing paragraph is authentically determined by the following circular, the conception of which it is unnecessary to explain:

Government of the District of Mexico: The most excellent minister of public works, under date of the 4th inst., says to the Government what I copy.

MOST EXCELLENT SIR: The law of December 3 last, which repealed those of November 25, 1853, and July 7, 1854, declared in its article 3 that the alienations of public lands made by the authorities of the departments under the central system, without the authorization or consent of the supreme government, and by those of the States, in contravention of the law enacted by the general congress on the 18th of August, 1824, were void and of no value, and that, in consequence, the holders of that class of lands were liable to the penalties provided for those who may acquire property (bienes) in an illegal and fraudulent manner, unless they should obtain the approval of said supreme government.

In virtue of this provision, which is so conclusive, this department has continued to revise the titles that have been forwarded to it, and to declare firm and valid those that were not included in some of the cases above mentioned, and void those that were found therein; stating to the parties in interest, with respect to these last ones, that the supreme government would ratify them upon payment of the indemnification which they themselves should propose. Many have been the declarations of this character that have been made and communicated by the agents of this department to the individuals they included; but very few have taken advantage of the provision in the law cited, and most have not even stated the cause that compelled them not to duly comply therewith; and inasmuch as a toleration of this failure to obey the supreme dispositions results in a loss of prestige on the part of the authority that makes them, and besides damages of consideration result to the parties in interest themselves, since, if they do not obtain the revalidation of their titles, they are liable to the penalties provided for those who acquire property in an illegal and fraudulent manner. His Excellency, the substitute President of the Republic, desiring to remedy these evils, has been pleased

to direct that the agents of this department state to the persons who hold lands, whose acquisition has been declared void by the law cited or by this department, by virtue of the said law, that if they do not apply for the revalidation of their titles within a reasonable time, which said agents shall set for them, by that very fact said lands shall be considered as national lands and shall be adjudicated to whoever applies for them.

All of which, by supreme order, I have the honor to communicate to your excellency, that it may, in the manner you may consider convenient, come to the knowledge of the inhabitants of that district, that they may, when informed of the obligation they are under, hasten to apply for the revalidation of their titles, in case they are found to be included in the provisions of the law cited of December 3, or that some resolution of this department has been communicated to them on those already presented.

And by order of his excellency the governor I inclose it to you that you may be pleased to publish this circular in the Official Daily newspaper, and I protest to you my esteem and consideration.

God and liberty.

J. M. DEL CASTILLO VELASCO.

MEXICO, *October 28, 1856.*

I made the statement in my original brief that Sonora and Sinaloa as the State of the Occident was the only one that had ever claimed any right to the vacant public lands under the law of August 4, 1824, and I have no reason to retract that statement. The fact is that all of the States of the Mexican Union originally undertook to exercise the right of disposition of the public lands within their boundaries, under the third article of the colonization law of August 18, 1824, which right they realized

the National Government could at any time revoke. As time passed, becoming stronger, they reached out and were disposed to be independent because of an infusion of population from the United States which was not in sympathy with the National Government, and particularly is this true of Texas, and undertook to dispose of the public lands irrespective of the colonization law. When called to task therefor by the National Government, they realized that under the colonization law of August 18, 1824, they could not claim the unrestricted right of disposition; but not presuming that they had any right under the law of August 4, they threw themselves upon the broad proposition that they had always been owners of the public lands and had acquired no rights from the National Government under the constitution or laws, and then, and not until then, commenced the controversy resulting in the revolution of 1835, the independence of Texas, and the subjugation of Sonora.

I notice in the brief of counsel for appellee a number of Texas cases cited with a view of sustaining the contention that the title to the vacant public lands was originally in the States. This question was one of the causes of the revolution; Texas made the contention good by force of arms, and it is hardly to be expected that its judiciary would hold that the contentions of the political power which achieved its independence and recognition as a nation were not legally correct. But Sonora did not fare so fortunately; in the revolution she was unable to make this contention good, and as a penalty for her rebellion she lost her autonomy as a State

and at the point of the bayonet surrendered to the National Government every contention that she had theretofore made and became an ordinary department thereof. One of her contentions was that the States had always been the owners of the vacant public lands within their boundaries, and Santa Anna, who was actively on the stage at that time, when he promulgated his decree in 1853, declaring that the right of disposition of the public lands belonged to the National Government and always had belonged to it, understood perfectly well that he was declaring a principle which had been maintained by the National Government by force of arms.

It is contended also that in 1838, when this grant was made, the officials and the people of Sonora were acting and carrying on their government as a sovereign and independent State under the national constitution of 1824 and the laws passed thereunder, as well as the State constitution of 1825 and laws passed thereunder, in the face of and in violation of the national constitution of 1836 and the laws promulgated thereunder. There was no armed conflict then going on, but there was a violation by the officials and the people of that municipal subdivision of every obligation they were under to maintain the integrity of the country of which they were subjects. The nation until some time after was not strong enough to reach Sonora. It seems to me that the conditions existing in 1838, as shown by the record and admitted by counsel in his brief, bring the acts of the officials within the letter and spirit of the decision of

Mr. Chief Justice Chase in the case of *Texas* v. *White* (7 Wall., 700), wherein he says:

> All admit that during this condition of civil war the rights of the State as a member and of her people as citizens of the Union were suspended. The government and citizens of a State refusing to recognize their constitutional obligations assume the character of enemies and incur the consequences of rebellion.

It seems to me that Jose Justo Milla and his confreres, who were carrying on a government under a system of laws in antagonism to the constitution of the nation, seeking to dispose of property over which they had no legal right as national officers, subjected their acts to the denouncement of absolute and unconditional nullity. I admit that if subsequent to that time it can be shown, and there should be no doubt about it, that the National Government had ever ratified or approved in some direct manner the making of a grant in this case, then it is entitled to confirmation. But so far, to my mind, this condition has not yet been satisfied.

It is contended also that Sonora, being a *de facto* State having possession of the property, had a right to dispose of it under the general proposition that a *de facto* government exercising governmental functions and in possession of property may lawfully dispose of the same. I do not deny the general proposition, but there is one element absent in the proposition stated by counsel in his brief as to *de facto* governments, and it is this: It is not shown that the officials of Sonora in 1838, with their antagonistic form of government in existence, were

ever recognized by the Mexican nation as a *de jure* government, with any rights as such under the constitution of 1824 and the laws promulgated thereunder. But on the contrary, as I stated in the original brief, instead of getting back to the constitution of 1824, Sonora was, by force and the power of the National Government, driven by Santa Anna into a more centralized form of government, under the plan of Tacubaya, in 1841.

It is further contended that the original grantee acquired whatever title the Mexican nation possessed, and counsel refers to the granting clause as evidence thereof. It appears therein that the granting officer recited that he conveyed the title of the State of Sonora, as well as that of the Mexican nation, and because of these recitals a presumption is to be indulged in that he possessed authority from the National Government to transfer whatever title it might have, and the case of *United States* v. *Peralta* (19 How.) is cited in support of the proposition. I am prepared to admit the general proposition that where an officer is authorized by law to perform a particular act or acts, and he does so, those acts are binding and valid, although he may misrecite the law conferring the power; but I am not prepared to admit, where an officer possesses no power under any law to do an act, and he does undertake to execute that act, and recites in a general way that he has authority to do so, that any presumption arises in its favor.

If the proposition as stated is correct, then we have no measures by which we can test the legality of the acts of the various officials of the Government. But this court, to

my mind, has settled the proposition in the case of *United States* v. *Cambuston* (20 How., 59), wherein it was held that under a government regulated by a constitution and laws creating officers and conferring authority and powers upon them, no presumptions as to original authority are to be indulged in. (*U. S.* v. *Garcia*, 22 How., 274.) The whole theory of this presumption grew out of the necessities of the litigation in the Florida and Louisiana cases because the property was the private property of the King of Spain, and his accredited agents might receive secret instructions of which the public was not aware.

Therefore, looking to the laws of the nation for the power and authority to dispose of the land, we find, as stated in the original brief on behalf of the Government, that Jose Justo Milla was not the officer authorized by law to make the grant, and that there was no such officer at that time as treasurer-general, and that the proceedings as disclosed by the *expediente* in no respect conformed to the provisions of the national law, and I may remark that they were not intended to conform to the national law, but were made by usurping State officers under a State law in violation of the constitution and laws of their country, and such action under the circumstances as disclosed by the *expediente*, calls for condemnation rather than the attempt to justify them by doubtful and strained application of general principles declared in cases having some substantial equities and some lawful inception.

I contend that there is no evidence in this case sufficient to warrant the court in holding that the Mexican nation subsequent to the date of the grant in 1838 ever

ratified or approved the same or the action of the officers thereof.

The evidence relied upon by counsel, to my mind, is insufficient to accomplish the purpose. The principal document relied upon is to be found on page 87 of the record, and I respectfully call particular attention to the same.

It is an *ex parte* affidavit alleged to have been made in the year 1881 before the treasurer-general of the State of Sonora by Matias Moran and Antonio Corrillo.

How this affidavit happened to be made we have no information, except the fact that it is now found among the files and the archives at Hermosillo. The peculiar wording of the same is enough to challenge its integrity, as well as the fact of its execution in 1881 at Hermosillo, where it remained undisclosed, so far as we are informed, until the suit was commenced in the Court of Private Land Claims in 1892.

The recitals, to commence with, are as follows:

> I, Manuel Diaz, as treasurer-general of the State of Sonora, Mexican Republic, acting by notary public, appeared Matias Moran and Citizen Antonio Corrillo, of this precinct, who do say that, being personally present in the treasury office for the purpose of giving compliance to the foregoing disposition or order of the governor of the State, proceeded to examine, one by one, the signatures of which are contained in the expediente that forms the title to the lands situated between the Colorado and Gila rivers, that in the year 1838 was adjudicated to Don Fernando Rodriguez, in that of 1847 was approved by the supreme government of the nation.
> * * *

It will be noted that these recitals are merely preliminary recitals to the testimony as to various facts set forth therein.

It is sought to draw from the foregoing statement the conclusion that these witnesses had knowledge of the approval of the National Government, or there was something appearing on the face of the expediente showing that fact.

All the examinations that were made prior to 1881 disclosed the existence of no such fact as the approval of the National Government, and I challenge, not the fact of the existence of this affidavit, but the truth of the recitals therein, based upon the idea that we are not able to verify it by any archive evidence, either at Hermosillo or elsewhere, and it must have been made with a view of afterwards being discovered by those who were called upon to investigate the archives when the claim might be presented for adjudication to the tribunals of the United States, or it would have been filed with the surveyor-general of Arizona.

And I submit that in all of the evidence and all of the correspondence no such approval or recognition as will warrant a confirmation has been shown.

It seems to me, considering the conditions of Mexico from 1838 to 1853, little presumption is to be indulged in as to the recognition by the Republic of Mexico of the acts of rebellious State officers.

It was as much as the national officers could do, by assuming supreme authority, to keep the entire nation from being dismembered by such officers as those who sought

to extend this title, and whatever denunciations may be made of Santa Anna, he thoroughly understood his people, he thoroughly understood the manner in which they could be governed, and, commencing with the overthrow of Iturbide in 1823 to 1854, he was the one central figure in Mexico, sometimes peacefully and sometimes by force of arms, always maintaining its national integrity as against the extravagant and rebellious contentions of the various municipal subdivisions thereof.

No one figure in Mexico stands out so prominently, from 1822 to 1856, as that of Santa Anna, and his continued participation in the affairs of the Government during that entire time stamps him as a man of most remarkable ability and force of character, and a man who desired and intended that the unity of the country should not be destroyed by secession.

As to the law with reference to the record required under the sixth article of the Gadsden Purchase, I simply desire to submit that under the decisions in the California cases the question of record was treated as one of evidence. Under the Gadsden Purchase it should be treated as one of procedure. And I do not see how the distinction between the requirements is to be effected, unless we are more stringent in verifying documents by the records under this treaty than under the former.

And it was the evident intention of the high contracting parties to require all titles to be submitted to a more severe test than formerly.

Muniments of title delivered by a government to an individual as evidence of title are always based upon a

governmental record. If the record exists and the muniments can not be verified by it, then it must fail for want of integrity. If the records of that date have been lost or destroyed, that fact must be shown, and in addition it must be shown that the identical documents produced had been recorded in those archives, and some direct connection must be made.

I contend under the testimony of Mr. Rochin, that the present book, being the registry of titles issued from the year 1831 to 1849, is the evidence required by the treaty.

Mr. Rochin says, in testifying as to the book: "It is a book made for the purpose of being presented in evidence," and I therefore contend that it was the only proper and lawful evidence of the record of the grant. (R., 85.)

It is contended that the State of Sonora, in its constitution, declared that it was the owner of the vacant public lands, and the court has been furnished with the constitution of Sonora of 1825 and a translation thereof.

I call the court's attention to the first section of article 1. It is as follows:

FIRST SECTION.—*Of the State, its territory and religion.*

> ARTICLE 1. The State of the West and its territory is composed of all its communities which embraced which heretofore was called the Intendencia and political government of Sonora and Sinaloa. A constitutional law will fix its limits.
>
> ART. 2. In that which belongs exclusively to its internal government and administration, it is free,

> independent, and sovereign, and in regard to that which relates to the Mexican federation, it delegates its rights and faculties to the congress of the union.

It does not seem to me that either of these articles sustain the contention that the public lands were declared to be the property of the State.

I next call the court's attention to section 16, Article 393, found on page 24 of appellee's printed translation, which is as follows:

SECTION SIXTEENTH.—*Of the public landed property of the State.*

REVENUES.

> ARTICLE 393. The rents that are not reserved to the federation by their decree of classification of the 4th of August of 1824, last past, are those which until now have formed the elements of which the landed property of the State is composed. In the future, Congress shall impose contributions that they may think proper to cover, as may be sufficient, the deficit that may result against the state of the general expenses of the Mexican federation that may be assessed for it to pay and the local expenses of the State.

An examination of the entire section which relates to landed property does not sustain the contention made by counsel for the appellee.

The laws of the State of Sonora of May 20, 1825, and July 11, 1834, nowhere mention the fact that they were passed for the purpose of disposing of the public lands under the revenue law of August 4, 1824.

And I am satisfied that all of the States relied for their right to dispose of public lands upon the third article of the colonization law of August 18, 1824.

One of the counsel in concluding his argument before this court, and referring to the case of *Texas* v. *White* (7 Wall., 700), undertakes to sustain the acts of the State officers upon the proposition that Sonora was a *de facto* State, and that rebellious officers acting under its laws and constitution were to have lawful recognition and effect given thereto, stating the fact that Mr. Chief Justice Chase in the opinion had recognized the principle that although a State might be in active rebellion against the National Government and its officers, acting in violation of its constitution and laws, yet in maintaining peace and good order, or, in other words, the mere police regulations, it would be recognized as having acted with lawful authority.

But he fails to draw the distinction between the exercise of police powers and the power to dispose of public property. That suit was instituted to nullify the acts of the officers of a State in rebellion in disposing of property which had theretofore belonged to the old State, and the court held in vigorous terms that the acts of the *de facto* officers of the State in rebellion in selling bonds that had belonged to the old State were invalid.

Therefore, applying the proposition to the acts of the officers of the State of Sonora in 1838, the attempt to dispose of public lands within its boundaries was invalid; and it makes no difference whether the lands belong to the *old State* or belong to the National Gov-

ernment. If they belong to the National Government, surely an attempt to despoil it of its property by those who were acting in violation of its constitution and laws can not be sustained.

In submitting this case, I contend that the doctrine announced by Mr. Chief Justice Chase in the case of *Texas* v. *White*, when applied to the testimony contained in the record, as to the situation of the State of Sonora and its government at the time the grant was made, leaves no foundation upon which to sustain this title, as a State grant, nor as the acts of officers lawfully and loyally executing powers conferred upon them by the nation, but by their contentions assumed the character of enemies and incurred the consequencies of rebellion.

We therefore respectfully submit the entire case.

HOLMES CONRAD,
Solicitor-General.

MATTHEW G. REYNOLDS,
Special Assistant to the Attorney-General.